State of Michigan
In the Supreme Court

Appeal from the Court of Appeals
Ford Hood, P.J., and Meter, and Schuette, JJ.

THE GREATER BIBLE WAY TEMPLE OF JACKSON,
a Michigan Ecclesiastical Corporation
Plaintiff-Appellee,

v.

CITY OF JACKSON,
JACKSON PLANNING COMMISSION,
and **JACKSON CITY COUNCIL,**
Defendants-Appellants.

Supreme Court No. 130194

Court of Appeals No. 250863

Michigan Trial Court File No. 01-003614-AS

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF APPELLANT, CITY OF JACKSON

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STATEMENT OF BASIS OF JURISDICTION

Amici adopt the Statement of Jurisdiction of Appellants.

STATEMENT OF QUESTIONS INVOLVED

I. **WHETHER THIS CASE FAILS TO MEET THE JURISDICTIONAL THRESHOLD OF 42 USC §2000cc(a)(2)(C), BECAUSE THE CITY'S LEGISLATIVE ACTION IN REFUSING TO REZONE APPELLEE'S PROPERTY FROM A SINGLE-FAMILY CLASSIFICATION TO A MULTIPLE-FAMILY CLASSIFICATION DID NOT INCLUDE OR INVOLVE AN INDIVIDUALIZED EXEMPTION THAT THE CITY REFUSED TO EXTEND TO THE CHURCH, AND BECAUSE THE CITY'S ACTION WAS NOT AN "INDIVIDUALIZED ASSESSMENT" OF APPELLEE'S PROPOSED LAND USE.**

The Circuit Court said "No."
The Court of Appeals said "No."
Appellee says "No."
Appellant City says "Yes."
Amici say "Yes."

II. **WHETHER THE JACKSON CITY COUNCIL'S REFUSAL TO ENACT LEGISLATION AMENDING ITS ZONING DISTRICT MAP TO RE-ZONE APPELLEE'S PROPERTY IN A MANNER INCONSISTENT WITH SURROUNDING LAND USES FAILED TO RISE TO THE LEVEL OF A SUBSTANTIAL BURDEN ON APPELLEE'S RELIGIOUS EXERCISE EITHER UNDER RLUIPA OR UNDER THE FREE EXERCISE/ESTABLISHMENT CLAUSE CASES THAT PRECEDED IT.**

The Circuit Court said "No."
The Court of Appeals said "No."
Appellee says "No."
Appellant City says "Yes."
Amici say "Yes."

III. **WHETHER, AS APPLIED BY THE COURT OF APPEALS TO MEAN THAT "INDIVIDUALIZED ASSESSMENT" INCLUDES A LEGISLATIVE ACT OF PREPARING A ZONING DISTRICT MAP, AND THAT A DENIAL OF A RE-ZONING TO BUILD AN APARTMENT COMPLEX IN THE MIDDLE OF A SINGLE-FAMILY RESIDENTIAL NEIGHBORHOOD IS A "SUBSTANTIAL BURDEN" ON RELIGION, RLUIPA IS UNCONSTITUTIONAL BOTH BECAUSE IT EXCEEDS THE**

SCOPE OF SECTION 5 OF THE FOURTEENTH AMENDMENT AND BECAUSE IT CONSTITUTES THE ESTABLISHMENT OF RELIGION.

The Circuit Court said "No."
The Court of Appeals said "No."
Appellee says "No."
Appellant City says "Yes."
Amici say "Yes."

I. STATEMENT OF INTEREST

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal government, with more than 1,600 direct member cities and 49 state municipal leagues that collectively represent more than 18,000 United States communities. Founded in 1924, NLC strengthens local government through research, information sharing, and advocacy on behalf of hometown America. Regulation of land use is a function traditionally performed by municipal government, as a lawful exercise of its police power, and NLC has consistently argued RLUIPA's unconstitutionality on behalf of its membership as an amici in prior cases. NLC's amici participation in this matter upholds its mission to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

Since 1935, the International Municipal Lawyers Association ("IMLA") has been the primary advocate for the chief legal officers of local governments throughout the Untied States and Canada. Since its establishment, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them. IMLA serves its membership by advocating the nationwide interests, positions, and views of local governments on legal issues. IMLA has appeared as an amicus curiae on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

II. STATEMENT OF FACTS

Amici NLC and IMLA accept the Statement of Facts as submitted by the Appellant, City of Jackson.

III. SUMMARY OF ARGUMENT

The decision to deny the Appellee's rezoning petition did not amount to an individualized assessment. While "individualized assessment" is not defined in the statute, the United States Supreme Court and other federal courts' treatment of the phrases "individualized government assessment" and "individual exemption," shows that the phrases comes into play only when the government delves into the motivations for conduct or when a generally applicable law contains exemptions available to secular entities, but not religious entities solely due to their religious character. Similarly, relying on local law (as development of land use law is a traditional sphere of local government), shows that Michigan law provides that the denial of a rezoning petition is not an individual assessment. This is because rezoning is legislative in nature.

If this Court finds the denial of the rezoning petition qualifies as an individual assessment, the Appellee nonetheless has failed to prove it is entitled to relief under RLUIPA. The Appellee has not proven that the denial of the petition creates a substantial burden on its religious exercise. While the denial may make it less convenient for the Appellee to construct a particular type of housing in the community, the denial does not prohibit housing production outright. A generally applicable neutral zoning law applies equally to both secular and religious actors. The blunt truth is that petitioners in a rezoning context cannot always get what they want. This is so regardless of whether they are secular or religious.

If this Court finds that the City has violated RLUIPA on these facts, then the *amici* submit that RLUIPA has changed the means of evaluating generally applicable laws contrary to United States Supreme Court precedent as outlined in the Court's Free Exercise cases. Congress does not have the power under either the Fourteenth Amendment or the Commerce Clause to dictate what constitutes a "substantial burden," and RLUIPA should be found unconstitutional.

IV. ARGUMENT

Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and its precursor the Religious Freedom Restoration Act ("RFRA"), in response to the United States Supreme Court's decisions in *Employment Div. Dep't of Human Resources v. Smith,* 494 U.S. 872 (1990) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents.") *See*, The Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 2, 8, 9,11, 22, 28-29, 31-32, 35, 38, 41, 48, 49, 51, 61 (1990); Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999); *see also*, RLPA Legislative History, p. S7778 (statement of Senator Reid). Amici have filed several briefs challenging the constitutionality of RLUIPA, maintaining that Congress acted outside its authority under the Commerce Clause, the Establishment Clause, and Section 5 the Fourteenth Amendment. However, the *amici* acknowledge the duty of this Court to interpret RLUIPA in a constitutional manner if possible. In light of this principle, the *amici* focus the majority of their argument to this Court not on RLUIPA's constitutional infirmities, but rather on the fact that even if one assumes RLUIPA is constitutional, the Appellee in this case cannot succeed on its claims.

A. Denying the Church's Rezoning Petition Does Not Qualify As An Individualized Assessment of the Reasons for the Church's Proposed Conduct

The City's denial of the Church's rezoning petition does not qualify as an "individualized assessment," a jurisdictional prerequisite for a RLUIPA challenge by the Church.

1. *The Courts Below Applied an Incorrect Analysis of "Individualized Assessment"*

RLUIPA provides for application when a land use regulation imposes a substantial burden on religious exercise and the government "makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." 42 U.S.C. 2000cc (a)(2)(C). RLUIPA does not define "individualized assessment." Several courts have assumed the reference in RLUIPA to "individualized assessments" is an attempt to codify *Smith*'s reference to "individualized government assessments" and "individualized exemptions." *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, 326 F. Supp.2d 1140, 1160 (E.D. Cal. 2003); *Hale O Kaula Church v. Maui Planning Com'n*, 229 F.Supp.2d 1056, 1072 (D. Hawaii 2002).

Unfortunately the courts have ignored the qualifying clause in *Smith:* "The *Sherbert* test [where governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest] ...was developed in a context that lent itself to individualized governmental assessment *of the reasons for the relevant conduct*." *Smith* at 884 (emphasis added). There are two forms of "individualized governmental assessment." The first evaluates the "reasons" behind relevant conduct while the second form, like a neutral law of general applicability, does not. The former are subject to strict scrutiny while the latter are not because "where the State has in place a system of individual exceptions" to conduct, then the State "must not refuse to extend that system [of exceptions] to cases of 'religious hardship' *without compelling reasons*." *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)) (emphasis added).

The Supreme Court's opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993), is in accord. There the ordinance at issue required *an evaluation of the particular justification* for the killing of an animal, thereby representing "a

system of 'individualized governmental assessment . . . .'" *See also, Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 166 (3d Cir. 2002) ("Because the ordinance in *Lukumi* gave officials discretion to consider 'the particular justification' for each violation, it 'represent[ed] a system of 'individualized governmental assessment of the reasons for the relevant conduct,'' triggering under *Smith* strict scrutiny of the ordinance's application to religiously motivated conduct.")

As outlined above, the operative concern in an individualized assessment/exemption case is whether the decision-maker's assessment is based on religion. In exemption cases, the question is whether a decision-maker failed to make available an exemption to an otherwise generally applicable neutral law where exemptions have been granted to similarly situated secular petitioners. *Cf. Grace United Methodist Church v. City of Cheyenne*, No. 03-8060, 2006 WL 1681321, at *8 (10th Cir. June 20, 2006). *See also, San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004). An examination of the case record shows no such discriminatory action here.

The reasons for denying the petition for rezoning are in no way based on the religious motivations or identity of the Appellee. The fact that Appellee wants to provide housing in the community to fulfill its religious tenets is of no consequence to the City's review of whether property in a single-family residential zone should be rezoned to multi-family status. The City's rezoning petition process simply does not constitute an "individualized governmental assessment of the *reasons for the relevant conduct.*"

Further, there is no evidence that the City granted rezoning exemptions to similarly-situated secular actors. To the contrary, the trial court concluded "the gravaman of [the Church's] complaint is *not* that the City discriminated against this Church in treating them unfairly as

opposed to other private corporations or non-profits organizations. The Church claims the City failed to recognize that they have certain obligations" under RLUIPA. *The Greater Bible Way Temple of Jackson v. City of Jackson, et al.*, No. 01-003614-AS at *4 (Feb. 25, 2003) (emphasis added). This assertion unconstitutionally transforms RLUIPA's statutory requirement of equal treatment between religious and secular actors regarding the application of land use and zoning law to mean "special treatment" for religious entities. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231-1232 (11th Cir. 2004). *See also Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago,* 342 F.3d 752, 762 (7th Cir. 2003) ("[N]o ... free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.")

There is also no evidence on the record that religious animus was the basis for the City's denial of the rezoning petition. Rather, the record shows that the City approved nine out of ten previous rezoning petitions by the Church. *Appellants' Leave to Appeal at 1.*

Governing bodies apply a process to evaluate petitions for action that, by necessity, demands individual review of the petitions. Without that process, decision-making would be arbitrary and capricious. The Council's decision regarding whether to upzone the property did not turn on the Appellee's identity as a religious entity. Rather the Council looked to the objective effects and consequences of upzoning the property, regardless of the identity of the owner. This is not the type of exemption that the Supreme Court held needed to be justified by a compelling interest. *See generally, Lukumi Babalu Aye,* 508 U.S. 520. *See also, Grace United Methodist,* 2006 WL 1681321 at *8 ("The fact that the Board decided to hold a hearing to determine whether the Church's use fell into an objective exemption category does not lead us automatically to conclude the Board was engaged in a system of subjective individualized

assessments.") Were all "individualized assessments" accorded strict scrutiny, the rule of *Smith* would have no distinction.

2. *Michigan Law Holds That Zoning Decisions Are Legislative Actions And Therefore Not "Individualized Assessments"*

The federal courts' recognition that land use law is a state and local power has meant that each state has been left to develop its own land use jurisprudence and that the federal courts have "emphasize[d their] reluctance to substitute [their] judgment for that of local decision makers, particularly in matters of such local concern as land-use planning. . . ." *Sameric Corp. v. Philadelphia*, 142 F.2d 582, 596 (3d Cir. 1998). Land use law naturally belongs under the control of state and local law. The reason for this is three-fold.

First, the permanent nature of land and each tract's uniqueness makes its uses far more relevant to those who are nearby than those who are far away. Second, how land is used is an essential ingredient for communities to develop their character and to ensure harmonious use. Third, by keeping land use law local, citizens have correspondingly more direct access to their representatives and a proportionally larger voice in the lawmaking process that so directly affects their interests. Land use law is enacted by state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in both altering the law and applying it. The impact of a building or land use project on a community and its residents is felt just as keenly whether it arises from a secular or a religious landowner-developer. For these reasons, it is appropriate to review Michigan law with respect to whether a decision respecting zoning constitutes an "individualized assessment."

It is settled law in Michigan that the zoning and rezoning of property is a legislative, not administrative function. *Sun Communities v. Leroy Twp.*, 241 Mich. App. 665, 669; 617 N.W.2d 42 (2000). *See also Schwartz v. City of Flint*, 426 Mich. 295, 307-308; 395 N.W.2d 678 (1986)

(Zoning is primarily a legislative function, subject to judicial review only to determine whether the power, as exercised, involves undue invasion of private constitutional rights without reasonable justification in relation to public welfare). Michigan courts review legislative decisions under a deferential standard of reasonableness. *Kropf v. City of Sterling Heights*, 391 Mich. 139, 157-158; 215 N.W.2d 179 (1974). *See also Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676, fn.10 (1976) ("The critical constitutional inquiry, rather, is whether the zoning restriction produces arbitrary or capricious results").

This Court has long affirmed that zoning decisions are presumptively valid legislative actions, provided a plaintiff does not succeed in carrying the burden of proof that a zoning decision was unreasonable. *Kropf,* 391 Mich. at 156-157, 172. *See also Brae Burn, Inc.* 350 Mich. 425, 430-432, 86 N.W.2d 155 (1957) ("We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises...It must appear that the clause attacked is an arbitrary fiat, a whimsical ipse dixit and that there is no room for a legitimate difference of opinion concerning its reasonableness."); *Northwood Properties Co. v. Royal Oak City Inspector*, 325 Mich. 419, 422-423, 39 N.W.2d 25, 26 (1949) ("While the ordinance must stand the test of reasonableness, the presumption is in favor of its validity....") As this Court has explained, rezoning is also a legislative act:

> The adoption of a zoning ordinance is a legislative act...Logic suggests that since the zoning map is also most inevitably a part of the zoning ordinance, the rezoning of a single parcel of land from one district to another is an amendment of the zoning ordinance and is likewise a legislative act. Because rezoning is a legislative act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation. Among other things, the legislature had provided for the amendment of zoning ordinances in essentially the same manner as their original enactment.

Sun Communities, 241 Mich. App. at 669 (*citing* Crawford, Michigan Zoning and Planning (3d ed.) § 1.11 p. 53); s*ee also Brae Burn,* 350 Mich. at 430; *Macenas v. Village*

of Michiana, 433 Mich. 380, 389, 446 N.W.2d 102, 106 (1989); *Davenport v. City of Grosse Pointe Farms Zoning Bd. of Appeals*, 210 Mich. App. 400, 403, n.1, 534 N.W.2d. 143, 144 (1995).

Alternatively, administrative decisions to grant or deny variances or use permits require that the decision-maker apply criteria to examine the requested action's unique and special circumstances, alleged hardship, deprivation of reasonable use, and whether the permitted use would be the least-restrictive means to enable reasonable use of a particular property. *Cf. Primera Iglesia Bautista Hispana of Boca Raton, Inc., v. Broward County,* ___ F.3d ___, 2006 WL 1493825 at *12 (11th Cir. June 1, 2006). If a legislative zoning decision imposes a hardship on a petitioner like the Church, then administrative relief through a variance or conditional use permit may be available. Mandelker, Land Use Law at § 4.15 (5th ed. 2005). "Indeed, the very purpose of a 'variance' allowed by zoning officials is to vary or modify rules and regulations in a case to avoid 'practical difficulties and unnecessary hardships.'" *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) *citing* 8E McQuillan, Municipal Corporations at §25.159 (3d Ed. 1965). *Compare Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 550 N.W.2d 772 (1996) (City council's decision to deny property owner's *rezoning* request did not inflict actual, concrete injury, and was not a final decision because the owner did not seek alternate relief from the ordinance through a variance request) *with Shepherd Montessori Center Milan v. Ann Arbor Charter Twp.,* 259 Mich. App. 315, 328, 675 N.W.2d 271, 280 (2003) (an ordinance to permit township board of appeals to authorize relaxation to grant variances in certain cases based on 'practical difficulties and unnecessary hardships' invited individualized assessments).

Applying the law to the facts of this case, it is evident the City's denial of the rezoning petition is not an individualized assessment under Michigan law. The Church filed a two-count

complaint in trial court. The first count appealed the rezoning denial, and the second count alleged violation of RLUIPA. *Appellants' Leave to Appeal at 2.* The trial court concluded that the City Council's denial of the rezoning petition was a reasonable decision, not arbitrary or capricious, because the decision was "substantially related to public health, safety, morals or general welfare." *The Greater Bible Way Temple of Jackson v. City of Jackson, et al.*, No. 01-003614-AS at *3 (Aug. 2, 2002). The Church did not appeal the dismissal of the first count. The Church's failure to appeal affirms there is no question of law or fact that the City's rezoning denial was a reasonable legislative action. *See also, Tel-Craft Civic Ass'n v. City of Detroit*, 337 Mich. 326, 331, 60 N.W.2d 294 (1953) ("Unless it can be shown that the council acted arbitrarily or unreasonably, their determination is final and conclusive and no court may alter or modify the ordinance as adopted.") Alternatively, if the Council's decision were administrative then the Court of Appeals would examine it under a stricter standard "to determine if it was based upon 'competent, material and substantial evidence on the whole record.'" Mich. Const. 1963, art.6, §28. *See also Viculin v. Department of Civil Service*, 386 Mich. 375, 391, 192 N.W.2d 449, 457 (1971) (Constitutional provision for review of administrative action merely dictates minimum scope for review to be provided by law, and such minimum scope is whether decisions, etc., are supported by competent, material and substantial evidence on whole record). This did not occur.

The Church's failure to appeal count one establishes that the City's legislative decision not to amend its zoning ordinance was reasonable. If a legislative decision is reasonable then it follows that the review of the particular issues necessary to reach the decision did not discriminate against the Church. *Cf. Grace United Methodist,* 2006 WL 1681321 at *8. Since the operative concern under RLUIPA is with outcome, then the Church's second count is unsustainable because it does not follow that the City's zoning decision, a reasonable legislative

one, was an "individualized assessment" that imposed a substantial burden, a jurisdictional prerequisite for a RLUIPA challenge by the Church.

B. The City's Denial of the Rezoning Petition Is Not a Substantial Burden

The City's denial of the Appellee's request to rezone the property at issue does not create a substantial burden on the Appellee's religious exercise. The plaintiff has the burden of persuasion on whether the challenged government practice substantially burdens the plaintiff's exercise of religion. 42 U.S.C. § 2000cc-4 (b). Once the plaintiff establishes a substantial burden on religious exercise exists, the burden shifts to the government to prove that application of any substantially burdensome practice is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. *See* 42 U.S.C. § 2000cc-2, 146 Cong. Rec. 7774-01, 7776 (July 27, 2000).

To determine whether RLUIPA applies, courts must answer two questions: (1) Is the burdened activity "religious exercise," and if so (2) is the burden "substantial"? *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). The *amici* adopt and support the City's position that the Appellee's construction and operation of a commercial multi-family housing unit is not a "religious exercise." For the sake of this argument, the *amici*, without conceding the point, proceed as if the construction of a multi-family housing complex constituted a religious exercise.

Turning to the second question, the *amici* note RLUIPA fails to define "substantial burden." Nevertheless, RLUIPA's legislative history reveals that "substantial burden" is to be interpreted by reference to the United States Supreme Court's First Amendment jurisprudence.

> The Act does not include a definition of the term 'substantial burden' *because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.* Nothing in this Act, including the requirement in Section 5(g) that its terms be broadly construed, is intended to change that principle. *The term 'substantial burden' as used in this*

> *Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.*

146 Cong. Rec. 7774-01, 7776 (July 27, 20000) (Emphasis added). *See also*, *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005) (RLUIPA is latest in a series of congressional efforts to protect religious exercise consistent with U.S. Supreme Court precedent). Under U.S. Supreme Court Free Exercise precedent, the denial of the Appellee's rezoning request cannot qualify as a substantial burden on the exercise of religion.

1. *U.S. Supreme Court Substantial Burden Precedent*

The U.S. Supreme Court's cases establish that to qualify as a substantial burden, government regulation must do more than simply make religious exercise more difficult. To constitute a "substantial burden," government regulation must force the religious adherent to take action which is contrary to his or her religious beliefs.

For instance, in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 450-51 (1988), the Court held the incidental effects of otherwise lawful government programs which do not coerce individuals into acting contrary to their religious beliefs do not constitute substantial burdens on the exercise of religion. In *Lyng*, the government wanted to build a road through an area of public land used by several Native American tribes. The plaintiff, a Native American organization, sought to block construction of the road, arguing, among other things, that construction of the road would substantially burden the practice of their faith. The Court, in denying their First Amendment claim, rejected an expansive reading of *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981) and *Sherbert v. Verner,* 374 U.S. 398 (1963). Specifically, the Court rejected the notion that either case implied that "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to *coerce individuals into acting contrary to their*

religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Lyng*, 485 U.S. at 450-51 (emphasis added). No compelling justification was needed because the government program did not coerce the tribes into acting contrary to their religious beliefs. The plan to construct the road did not rise to the level of a substantial burden.

In *Thomas*, where the plaintiff was denied unemployment compensation benefits after he quit his job following his transfer to his employer's weapons production division, the Court did find a substantial burden on religious exercise existed. The plaintiff's faith as a Jehovah's Witness forbade him from engaging directly in weapons production. The Court held that the denial of benefits placed a substantial burden on the practice of his faith. "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* at 717-18. Because Thomas had to choose between working in weapons production and his religious conviction that such activity was prohibited, the state's unemployment compensation scheme imposed a substantial burden on his religious exercise.

Close to twenty years earlier, in a very similar case, the Court found that another state regulation unacceptably burdened the exercise of religion. In *Sherbert*, the plaintiff was denied unemployment compensation benefits for refusing to work on Saturday, her Sabbath. The Court held that a burden had been placed on the plaintiff's free exercise of her religion because the unemployment regulations forced "her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404. Because she had to choose between following her religion and having access to a government benefit, the regulations there

also created a substantial burden on her religious exercise.

These cases establish "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." *Thomas*, 450 U.S. 716. However, the facts of this case do not establish that the Appellee must make such a choice. The City's rezoning process is available to everyone on an equal basis without regard to religious or non-religious affiliation. Further, the City's decision regarding the Appellee's rezoning petition was made without reference to the Appellee's religious identity or purpose, but simply with reference to the impact of allowing multi-family housing in a single family zone. The denial actually created a "win-win" outcome because it would permit the Church to exercise its religious tenets while respecting the scope and scale of the existing residential neighborhood. The Appellee may still construct housing for the community. It simply cannot require the City to accept the construction of the housing type it wants at the location most convenient to the Appellee. These facts do not amount to a substantial burden on religious exercise.

2. *Lower Federal Court Decisions also Support the Fact that No Substantial Burden Exists in this Case*

The federal courts of appeal also have followed the Supreme Court's reasoning. For instance, before finding a substantial burden on religious exercise, the Eighth Circuit requires that government policy "significantly inhibit or constrain" religious exercise. *See Murphy v. Missouri Dept. Of Corr.,* 372 F.3d 979, 988 (8th Cir. 2004). Similarly, the Eleventh Circuit has held that a "substantial burden" is one that results "from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir.2004).

The Ninth Circuit has defined "substantial burden" in accordance with its "plain meaning," relying in part on dictionary definitions for "burden" and "substantial. The court

defined *burden* as "something that is oppressive" and *substantial* as "considerable in quantity" or "significantly great." *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024, 1034 (9th Cir.2004) (relying on Black's Law Dictionary 190 (7th ed.1999) and Merriam-Webster's Collegiate Dictionary 1170 (10th ed.2002), respectively). Thus, the Ninth Circuit stated for a land use regulation to impose a "substantial burden," it must be "oppressive" to a "significantly great" extent. San Jose Christian College argued it was substantially burdened because it was unable to use its own property "to carry on its mission[s] of Christian education and transmitting its religious beliefs." The Ninth Circuit disagreed, noting specifically that the land use regulation at issue was applied equally to all.

The Seventh Circuit defines a "substantial burden" as a regulation that "bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *C.L.U.B.,* 342 F.3d at 761. At issue in *C.L.U.B.* was the application of the Chicago Zoning Ordinance ("CZO") to several local churches attempting to establish new sites within the city. Churches, as well as clubs, lodges and the like, were required to obtain "Special Use" approval in order to locate within business and commercial zones. *Id.* at 755, 758. "Special Use approval [was] expressly conditioned upon the design, location, and operation of the proposed use consistent with the protection of public health, safety, and welfare, and the proposed use [could] not substantially injure the value of neighboring property." *Id.* at 755 (citation omitted). After repeatedly applying for and being denied special use permits, the churches sued the city, claiming, in relevant part, that the CZO violated RLUIPA.

The Seventh Circuit rejected the plaintiffs' RLUIPA claim because the burdens of the permit approval process were "incidental to *any* high-density urban land use," and did not amount to a substantial burden on religious exercise. *Id.* at 761. While the regulations and

process created difficulties for those wishing to make use of property in Chicago, the difficulties were felt by all persons or entities, religious or nonreligious, and did not render impracticable the use of real property in Chicago for religious exercise, much less discourage churches from locating or attempting to locate in Chicago. *Id.* (citation omitted). The same is true here: while a multi-family residential complex, whether built by a religious or non-religious entity, may not be located in a single-family zone, there are other means available to the Appellee to provide housing to the community. "Whatever specific difficulties [plaintiff church] claims to have encountered, they are the same ones that face all [land users]. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Id.* (alterations in original) (quoting *Love Church v. City of Evanston*, 896 F.2d 1082, 1086 (7th Cir. 1990)).

RLUIPA's brief legislative history commenting on "substantial burden," the Supreme Court's pronouncements on the meaning of "substantial burden," and the decisions of other circuits all show that government action or regulation creates a "substantial burden" on a religious exercise only if it truly pressures the adherent to significantly modify his behavior to violate his religious beliefs. As in the *Civil Liberties* case, the City's regulations in this case do not render religious exercise effectively impracticable. There is no evidence in the record demonstrating that the Appellee is precluded from using other sites within the City, nor is there any evidence that the City would not impose the same requirements on any other religious or secular entity seeking to build multi-family housing in a single-family residential zone. The *amici* request that this court find the City did not impose a substantial burden on the Appellee when it denied the rezoning application.

C. Congress Exceeded Its Powers By Enacting RLUIPA'S Land Use Provisions

The *amici* recognize the Court's obligation to interpret RLUIPA in a constitutional manner if possible. The *amici* also stand by their position in other cases that, if RLUIPA is found to impose strict scrutiny on generally applicable local government land use regulations, thereby imposing a stricter standard than the Supreme Court has articulated in its Free Exercise cases, then RLUIPA is unconstitutional. Significant to this case is the power of Congress to enact RLUIPA pursuant to the Fourteenth Amendment and the Commerce Clause.

The Supreme Court consistently has recognized "the States' traditional and primary power over land and water use." *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) (holding that regulation of land use is a function traditionally performed by local governments); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("[R]egulation of land use [is] a function traditionally performed by local governments"); *see also F.E.R.C. v. Mississippi*, 456 U.S. 742, 767-68 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity"); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928) (reviewing zoning restrictions under low level scrutiny); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927) (upholding local setback requirement); *Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (upholding local zoning ordinance prohibiting construction of business buildings); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926) (local ordinance imposing building restrictions upheld). Section (a) of RLUIPA, which governs land use law, is unconstitutional because it is beyond Congress' power under the Fourteenth Amendment and under the Commerce Clause.

1. *Section (a)(2)(C) of RLUIPA Is Not A Proper Exercise of Congressional Power Under Section 5 of The Fourteenth Amendment*

Like RFRA, RLUIPA is not a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment. *Boerne*, 521 U.S. at 519. Congress has the "power to enforce, by appropriate legislation, the provisions of the [Fourteenth Amendment]." U.S. Const. Amend. XIV, Section 5. That "power is limited to enforcement; the Fourteenth Amendment does not give Congress the power 'to determine what constitutes a constitutional violation.'" *Nanda v. Bd. of Trustees of the Univ. of Illinois*, 303 F.3d 817 (7th Cir. 2002), *cert. denied*, 123 S.Ct 2246 (2003) (citing *Boerne*, 521 U.S. at 519). Determining constitutional violations is a power properly lodged with the courts. *Id.* (referring to *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 365 (2001)); *see also Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) ("*Boerne* confirmed that it falls to [the courts], not Congress, to define the substance of constitutional guarantees").

Under Section 5 of the Fourteenth Amendment, Congress may not regulate the states' regulation of land use unless there is proof that the states have engaged in "widespread and persisting" constitutional violations in the land use context and that the federal law is "congruent and proportional" to those violations. *Garrett* 531 U.S. at 365; *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 645 (1999); *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Boerne*, 521 U.S. at 519-20, 533-34; *Nanda*, 303 F.3d at 824. RLUIPA fails both requirements.

a. There Is No Widespread and Persisting Pattern of Constitutional Violations Towards Religious Landowners

For Congress to exercise properly the power to enact a law pursuant to Section 5 of the Fourteenth Amendment, there must be a pattern of "widespread and persisting" constitutional violations by the states. *Kimel*, 528 U.S. at 81-82; *Garrett*, 531 U.S. at 365; *Boerne*, 521 U.S. at 519-520, 530; *Nanda*, 303 F.3d at 824; *Elsinore Christian Center v City of Lake Elsinore*, 291 F. Supp. 2d 1083 (2003). This principle exists to square the Section 5 powers of Congress with the Constitution's inherent limits on federalism. *Boerne*, 521 U.S. at 524.

Those limits were never more in need than with RLUIPA, which attempts to federalize a bastion of state and local control: land use governance. Under RLUIPA, the state and local governments and the people they serve are no longer able to determine local neighborhood requirements; to ensure peaceful enjoyment of private property, especially that of homeowners; or, to enforce the many comprehensive plans that outline land use and zoning throughout the community to ensure harmonious use. RLUIPA hands the religious landowner a unique "legal weapon" to battle laws restricting traffic, noise, and intense uses, and in effect, steals state and local power to make such determinations. *See Boerne*, 521 U.S. at 534-35.

The supporters of RLUIPA cobbled together a short string of land use anecdotes that do not begin to illustrate the sort of widespread and persisting constitutional violations by the states necessary to justify such massive congressional intervention in such a substantial and traditional arena of state and local control. While it is true that religious landowners, like every other land-owning entity, bear incidental burdens imposed by generally applicable, neutral land use regulations, such burdens do not amount to constitutional violations. There is little, if any, proof that religious entities have been the target of discrimination by local zoning boards. Indeed,

places of worship fair well in the zoning process. *See* Mark Chaves and William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. Church & St. 335, 337 (2000).

The legislative history of RLUIPA's predecessor, RLPA, attempts to prove a widespread and persisting pattern of constitutional violations by state and local lawmakers with nothing but the following: (1) two instances of unconstitutional state action; (2) two allegations of facts purporting to show unconstitutional government action; (3) two references to cases where the courts did not find constitutional violations and the religious entity criticized the result; (4) several references to garden variety zoning laws applied to places of worship; and (5) private, rather than governmental, expression that does not implicate constitutional violations. Marci A. Hamilton, *Federalism in the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J. 311, 346-353, 362 (2003).

The record behind RLUIPA simply does not support the claim that there are widespread and persisting constitutional violations by the local and state governments against religious entities. *See* Caroline Adams in *2003 Zoning and Planning Law Handbook* 442-55 (2003) (concluding that, in context of RLUIPA, congressional use of its Section 5, Fourteenth Amendment power was not remedial because Congress lacked a sufficient record to demonstrate a pattern of discrimination). Although land use laws may have an "effect" on religious entities, just as they have an effect on all other landowners and developers, there is no evidence of widespread and persisting discrimination against religious landowners that would justify the federal overreaching of RLUIPA.

b. RLUIPA Is Not Congruent and Proportional to Any Evidence of State Constitutional Malfeasance

Section 5 of the Fourteenth Amendment grants Congress the power only to provide remedies congruent and proportional to violations of the rights incorporated in the Fourteenth Amendment. *Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; *Florida Prepaid*, 527 U.S. at 645-46; *Alden*, 527 U.S. at 756; *Boerne*, 521 U.S. at 519-520, 530, 545-46; Marci A. Hamilton, David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 Cardozo L. Rev. 469 (Dec. 1999). When it examined RFRA's constitutional infirmities, the Supreme Court explained, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U.S. at 519-520, 530; *See also*, *Nanda*, 303 F.3d at 824. *United States v. McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003); *Raich v. Ashcroft*, 352 F.3d 1222, 1233 (9th Cir. 2003).

Even if this Court were to find widespread and persisting free exercise violations by local land use lawmakers across the country, RLUIPA's resort to strict scrutiny for every instance in which a land use law is applied to a religious landowner is incongruent and disproportional to any problems such landowners are claiming in the land use context. *Boerne*, 521 U.S. at 530-32. RLUIPA is not a valid exercise of congressional power under Section 5 of the Fourteenth Amendment.

2. *Section (a)(2)(B) of RLUIPA Is Not a Proper Exercise of Congressional Power under the Commerce Clause*

The Commerce Clause provides Congress with the authority to enact legislation to regulate commerce with foreign nations, among the states and with the Indian tribes. U.S. Const. art. 1, sec. 8, cl.3. The Supreme Court has identified three broad categories of activity that

Congress may regulate under the Commerce Clause. *See U.S. v. Lopez*, 514 U.S. 549 (1995). The first two categories involve laws that either "regulate the use of the channels of interstate commerce" or "regulate and protect the instrumentalities of interstate commerce, and the persons or things in interstate commerce, even though the threat may come only from intrastate activities," such as interstate highways, telecommunications, or shipping. *Lopez*, 514 U.S. at 561. RLUIPA does not fit into either of these two categories. The third category includes the power to regulate intrastate activities where the activity has a substantial effect on interstate commerce. *Id.* at 559.

Five years after *Lopez*, the Supreme Court overturned the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000), and "established what is now the controlling four-factor test for determining whether a regulated activity 'substantially affects' interstate commerce." *McCoy*, 323 F.3d 1114, 1119 (9th Cir. 2003). When considering whether a statute is consistent with the Commerce Clause Power, the determinative factors are:

> 1) [W]hether the statute in question regulates commerce 'or any sort of economic enterprise'; 2) whether the statute contains any 'express jurisdictional element which might limit its reach to a discrete set' of cases; 3) whether the statute or its legislative history contains 'express congressional findings' that the regulated activity affects interstate commerce; and 4) whether the link between the regulated activity and substantial effect on interstate commerce is 'attenuated'.

Id. (quoting Morrison, 529 U.S. 598, 610-612 (2000)). Local land use regulation fails to qualify as a regulated activity, which substantially affects interstate commerce.

a. RLUIPA Does Not Regulate Commerce or Any Sort of Economic Enterprise

RLUIPA regulates land use *law*. State and local law do not affect interstate commerce for purposes of Commerce Clause analysis. "The Commerce Clause . . . authorizes Congress to regulate interstate commerce directly . . . ." *Printz v. United States*, 521 U.S. 898, 924 (1997).

While it is true that the development and use of land often contains an economic component – such as the sale or lease or property or the sale of building supplies – that economic component does not give Congress plenary power to regulate land use under the Commerce Clause. RLUIPA regulates a non-economic activity, land use regulation, rather than land use itself, which cannot support a "nexus with interstate commerce," *See Lopez*, 514 U.S. at 562. The Supreme Court's federalism cases have made clear that path is foreclosed to Congress. *Garrett*, 531 U.S. at 364 (citing *Kimel*, 528 U.S. at 79 (2000)); *Morrison*, 529 U.S. at 618-619; *Printz*, 521 U.S. at 924.

b. RLUIPA Does Not Contain Any Express Jurisdictional Element Which Might Limit Its Reach to a Discrete Set of Cases

RLUIPA requires a showing that the "substantial burden affects . . . commerce . . . among the several states." 42 U.S.C. § 2000cc(a)(2)(B). However, this does not save RLUIPA from constitutional infirmity. RLUIPA "fails to limit the reach of the statute to any category...of cases that have a particular effect on interstate commerce. *See McCoy*, 323 F.3d at 1124. To the contrary, it encompasses virtually *every* case imaginable" where a religious group challenges a local land use law. *Id.*

c. RLUIPA and Its Legislative History Do Not Support the Finding That the Regulated Activity Affects Interstate Commerce

As previously explained, *supra*, the congressional record supporting RLUIPA is dubious at best. While the legislative history of RLUIPA indicates Congress believed that "the burden [*i.e.*, the local government law] prevents a specific economic transaction in commerce, such as a construction project, purchase or rental of a building, or an interstate shipment of religious goods, " there is little more to suggest Congress considered the question of local land use regulations' direct effect on interstate. 146 Cong. Rec. S. 7774 (2000).

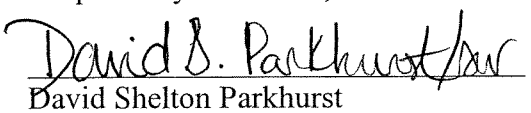
d. The Link Between the Regulated Activity and Substantial Effect on Interstate Commerce Is Too Attenuated to be a Constitutional Exercise of the Commerce Clause Power

That which is being regulated pursuant to the Commerce Clause must "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558. Individual instances of economic activity may not, but their aggregation may substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111 (1942). However, aggregation is not applicable to areas of traditional local regulation, such as land use regulation, and Congress exceeded its authority under the Commerce Clause when it enacted RLUIPA. *See Morrison*, 529 U.S. at 617-18 (stating commerce power does not extend to traditional local regulation even if, in the aggregate, such activities substantially affect commerce).

CONCLUSION

For these reasons, the *amici* request that this Court reverse the appellate court's ruling that the City's rezoning process constitutes an "individual assessment" under RLUIPA, reverse the appellate court's ruling that the denial of the rezoning constitutes a substantial burden on the Appellee's religious exercise, and enter judgment on the case in favor of the City of Jackson.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two true copies of the foregoing amici brief were served via UPS to the parties listed below on July 10, 2006.

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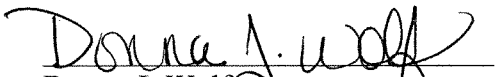

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